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No. 94-2090

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

PACESETTER CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a party to a collective bargaining agreement can willingly submit to arbitration the issue of arbitrability, acknowledge the jurisdiction of the arbitrator, present evidence and argument, submit the issue to the arbitrator for decision and then raise the issue of arbitrability in a court following an adverse ruling.

2. Whether a party to a collective bargaining agreement can claim repudiation of that agreement by acts which occurred prior to this Court's recognition of the repudiation doctrine in *NLRB v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers (Higdon)*, 434 U.S. 335 (1978).

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Pacesetter Construction Company, Inc. ("Pacesetter") has not presented any new issue or matter of importance for this Court to consider. As described below, there are no conflicts between the Ninth Circuit and this Court, or any conflicts among the circuits, that should occupy the scarce resources and time of the Supreme Court. The Ninth Circuit was correct in confirming the arbitral award and its decision must be upheld.

Pacesetter erroneously includes in its Statement the legal conclusion that it "repudiated [its] Pre-Hire Agreement" with Respondent Carpenters 46 Northern California Counties Conference Board (the "Union"). Not only does this statement directly contradict the findings of the

Board of Adjustment (upheld by the Ninth Circuit, which found that the Board had jurisdiction to decide the issue), it improperly attempts to set forth as fact a major dispute in this case.

At the Board of Adjustment hearing on January 14, 1992 (the "arbitration" at issue in this case),[1] Pacesetter *acknowledged the jurisdiction of the Board of Adjustment to decide the issue of arbitrability* before submitting the issue to the Board for decision. Pacesetter stated that the Board "already has jurisdiction over Pacesetter Construction by virtue of an arbitration that occurred under the very document that the union claims creates a contract, namely the '74 [collective bargaining] agreement." As noted by the District Court below, "Pacesetter specifically raised the issue of repudiation," at the Board of Adjustment hearing when it stated "[b]y way of argument, in addition to the arguments on the evidence that was [*sic*] presented before, we would submit that any agreement that emanated form [*sic*] the 1974 agreement was repudiated by the acts of Pacesetter. . ." (Petitioner's Appendix ("Appendix") at p. 12a, citing to the Transcript of Grievance Proceedings). The District Court also noted that Pacesetter's summary judgment motion stated, "*Second, the Board of Adjustment ignored the evidence of repudiation presented by Pacesetter.*" (Appendix at p. 12a, emphasis in the original).

Pacesetter presented evidence and argument at the Board of Adjustment hearing in support of the following defenses: (1) that the grievance should be denied under the doctrines of res judicata and collateral estoppel, based upon the 1981 Koven Decision; (2) that Pacesetter had terminated the collective bargaining agreement prior to the filing of the grievance; (3) that Pacesetter had repudiated the collective bargaining agreement prior to the filing of

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[1] Awards of Boards of Adjustment are to be given the same deference as awards issued by impartial arbitrators. *General Drivers, Warehousemen & Helpers, Local Union No. 89 v. Riss & Company*, 372 U.S. 517, 519 (1963).

the grievance; and (4) that the collective bargaining agreement between the Union and Pacesetter had been extinguished.

Thus, there can be no question that Pacesetter recognized the jurisdiciton of the Board of Adjustment and fully participated in the proceedings, including the presentation of evidence and argument. Unfortunately, when Pacesetter lost the arbitration, Pacesetter decided it wanted a "second bite at the apple" and chose to collaterally attack the proceedings in which it had earlier participated.

REASONS FOR DENYING THE WRIT

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the Ninth Circuit's unpublished opinion in this case. The decision below is not in conflict with any decision of this Court or any other circuit. Because Petitioner voluntarily submitted its dispute regarding arbitrability to the Board of Adjustment without reserving the issue of arbitrability, it waived its right to have the matter heard by any court on the merits of the dispute.

Pacesetter's waiver of its right to have the matter heard by the court applies to the purported repudiation of its labor agreement in 1975 as well. Even if it were properly a subject of judicial review, Petitioner's alleged repudiation took place prior to the time the repudiation doctrine was even recognized by this Court in *NLRB v. Int'l of Bridge, Structural and Ornamental Iron Workers (Higdon)*, 434 U.S. 335 (1978). In light of the subsequent abolition of the repudiation doctrine, the issue is of interest mainly for its historical value since it has no application to acts occurring after February 20, 1987. *Camping Construction v. District Council of Iron Workers*, 915 F.2d 1333, 1339 (9th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991).

I. THE NINTH CIRCUIT'S OPINION BELOW IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *FIRST OPTIONS OF CHICAGO, INC. v. KAPLAN*, —— U.S. ——, 115 S.Ct. 1920, 63 U.S.L.W. 4459 (1995)

It is absolutely true that unless the "parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitraiton must be decided by the court, not the arbitrator." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 89 L.Ed.2d 648, 106 S.Ct. 1415 (1986). *First Options of Chicago, Inc. v. Kaplan*, —— U.S. ——, 115 S.Ct. 1920, 63 U.S.L.W. 4459 (1995), relied on by Petitioner, did not in any way change this legal principle. The idea that a court is to review arbitrability was first set forth by this Court thirty-five years ago in the well-known "Steelworkers' Triology." *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 4 L.Ed.2d 1403, 80 S.Ct. 1343; *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L.Ed.2d 1409, 80 S.Ct. 1347 and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 4 L.Ed.2d 1424, 80 S.Ct. 1424 (1960). The question here is whether Pacesetter, having voluntarily submitted the issue of arbitrability to the Board of Adjustment and having recognized the Board's jurisdiction over that issue, may have that issue reviewed by a court when dissatisfied with the result.

Petitioner overlooks another important principle of the "Steelworkers' Trilogy" which provides that "where a contract contains an arbitration clause, there is a presumption of arbitrability in the sense that 'an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT&T Technologies, Inc., supra*, 475 U.S. at 650, citing *Warrior & Gulf, supra*, 363 U.S. at 582-583.

Finally, *First Options* dealt with arbitration in a commercial context, where the court looked to state law principles governing the formation of contracts. State contractual law is, of course, not applicable in the labor context concerning the interpretation of labor collective bargaining agreements. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). Since the instant case must be determined by the standards established under federal labor law, state contractual law is simply inapplicable. Therefore, the Ninth Circuit applied the correct standards in the instant case and its decision must be upheld.

II. THERE IS NO CONFLICT WITH OTHER CIRCUITS

Petitioner seeks to overturn an entire line of Ninth Circuit cases going back to 1964 which hold that where an employer submits its case to the arbitrator upon the merits, without reservation of the question of jurisdiction, the employer has waived its right to subsequent judicial examination of the issue of arbitrability. *George Day Construction Co. v. United Brotherhood of Carpenters*, 722 F.2d 1471 (9th Cir. 1984); *Syufy Enterprises v. Northern California State Ass'n of IATSE Locals*, 631 F.2d 124 (9th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *International Brotherhood of Teamsters, Local 117 v. Washington Employers, Inc.*, 557 F.2d 1345 (9th Cir. 1977) and *Ficek v. Southern Pacific Co.*, 338 F.2d 655 (9th Cir. 1964). As stated in *Ficek*, "a claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrator to act." 338 F.2d at 657. This is precisely what Pacesetter did in the instant case.

The Ninth Circuit's position is reinforced by this Court's decision in *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 89 L.Ed.2d 648, 106 S.Ct. 1415 (1986). Pacesetter claims that the Third, Seventh and Second Circuits are in conflict with

the Ninth Circuit (and by extension, with *AT&T Technologies*) on the issue of who has primary authority to determine the arbitrability of disputes. As stated in *AT&T Technologies*, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.' *AT&T Technologies, supra*, at 650, citing *Warrior & Gulf, supra*, at 584-585.

Pacesetter cites the Third Circuit decision *Pennsylvania Power Co. v. Local Union No. 272 of IBEW*, 886 F.2d 46, 50 (3rd Cir. 1989) for the proposition that a party must "clearly indicate his willingness to forego judicial review." However, Pacesetter fails to cite the underlying premise of the *Pennsylvania Power* case that "where a party voluntarily submits an issue to arbitration without challenging the arbitrability of that issue, and where the merits are ruled upon by the arbitrator, that party may be deemed to have waived his right to judicial review of the arbitrability issue." *Ibid.* Indeed, even in the Third Circuit, the party must make an objection to the arbitrator's authority. So, too, in the Seventh Circuit, where "[i]f a party voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it." *International Ass'n of Machinists and Aerospace Workers, Lodge No. 1777 v. Fansteel, Inc.*, 900 F.2d 1005, 1009 (7th Cir. 1990), *cert. denied*, 498 U.S. 851 (1990) citing *Jones Dairy Farm v. Local No. P-1236 UFCW Int'l Union*, 670 F.2d 173, 175-176 (7th Cir. 1985). In *Fansteel*, the company stated that the disputed issue was to be decided by "the National Labor Relations Board and not arbitration" before submitting to arbitration. The Seventh Circuit pointed out that the employer "carefully and explicitly, in unambiguous language, made known to the arbitrator and the union that it was maintaining its objections to arbitrability even though it was agreeing to proceed with the arbitration hearing." *Ibid.* As correctly noted by the

Ninth Circuit, "Pacesetter did not preserve the question of whether the Board had jurisdiction over the repudiation issue by objection to the Board's authority to decide the repudiation issue" (Appendix at p. 3a). As a result, even under the authorities cited from the allegedly "conflicting" circuits, Pacesetter waived its right to judicial review of the arbitrability issue.

III. PACESETTER CANNOT "REPUDIATE" ITS LABOR AGREEMENT PRIOR TO THE EXISTENCE OF SUCH A RIGHT

As set forth above, the Ninth Circuit correctly found that Pacesetter had waived the repudiation issue by failing to object to the Board of Adjustment's jurisdiction. Even if Pacesetter were able to convince this Court that judicial review was appropriate, Pacesetter relies on an alleged repudiation of its labor agreement in October, 1975, a date which precedes this Court's recognition of the repudiation doctrine in 1978. *NLRB v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers (Higdon)*, 434 U.S. 335 (1978). The Board of Adjustment did not act in "manifest disregard of the law" as Pacesetter claims. Rather, the Board considered all the evidence before it and rejected Pacesetter's repudiation argument, as shown by the Board's finding in its Award that "while there is a letter of repudiation for Gary Johnson, there is no letter of repudiation for Pacesetter. Based on the fact that Pacesetter signed the collective bargaining agreement, the Board of Adjustment Panel finds that Pacesetter is bound to that Agreement, and is in violation of the Agreement at the present time."

On February 20, 1987, the National Labor Relations Board abolished the right to unilaterally repudiate pre-hire construction labor agreements entered into under § 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f). *Deklewa v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 3*, 282 N.L.R.B. No. 184,

1986-7 NLRB Dec. (CCH) § 18,549 (Feb. 20, 1987). This decision was followed by the Ninth Circuit sitting *en banc* in *Mesa Verde Construction Co. v. Northern Cal. District Council of Laborers*, 861 F.2d 1124, 1126 (9th Cir. 1988) ("*Mesa Verde II*"). On remand, the Ninth Circuit held that the *Deklewa* rule would not be applied retroactively to acts occurring prior to February 20, 1987. *Mesa Verde Construction Co. v. Northern District Council of Laborers*, 895 F.2d 516, 520 (9th Cir. 1990) ("*Mesa Verde III*").

Pacesetter cites *Camping Construction v. District Council of Iron Workers*, 915 F.2d 1333, 1339 (9th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991) for the proposition that "pre-Deklewa law must be applied when a party's repudiation of a pre-hire contract occurred before February 20, 1987." However, this statement overlooks the development of the repudiation doctrine and the critical issue of what law applied to Pacesetter's alleged repudiation.

In 1971, the National Labor Relations Board ("NLRB") initially developed the repudiation doctrine, but the D.C. Circuit denied its enforcement in *R.J. Smith Construction Co.*, 191 NLRB 693 (1971), *enforcement denied sub nom. Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973). The NLRB attempted to refine the doctrine in *Dee Cee Floor Covering, Inc.*, 232 NLRB 421 (1977), but it was not until 1978 when this Court decided *NLRB v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers (Higdon)*, 434 U.S. 335 (1978) that the repudiation doctrine was actually accepted. Pacesetter's alleged repudiation in 1975 must be analyzed according to the then applicable law. Even as late as 1983, this Court did not determine *how* or what was required to repudiate a "pre-hire" construction collective bargaining agreement. *Jim McNeff v. Todd*, 461 U.S. 260, 271 (1983). Not only does Pacesetter ask this Court to look back over twenty years to the date of its alleged repudiation, it presents an erroneous statement of the applicable law.

CONCLUSION

As pointed out by the District Court, allowing Petitioner to voluntarily submit the repudiation issue to the Board of Adjustment and then question the authority of the Board to act would contravene Supreme Court and Ninth Circuit authority and undermine confidence in the finality of arbitration. (Appendix at page 12a-13a). The Ninth Circuit correctly found that when Respondent "submitted the repudiation to the Board without objecting to the Board's jurisdiction over the issue, it implied its consent to have the Board decide whether it repudiated the [collective bargaining] Agreement." (Appendix at page 4a). For the reasons set forth above, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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